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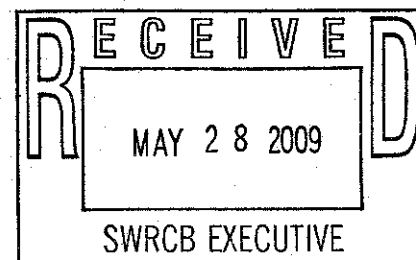
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Established 1908

May 28, 2009

VIA E-MAIL & OVERNIGHT DELIVERY

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814



Re: Water Quality Enforcement Policy Workshop 6/4/09

Dear Ms. Townsend:

We represent numerous retail water suppliers in Southern California. Several of our clients have had mandatory minimum penalties ("MMPs") imposed on them pursuant to Water Code section 13385.1 for failure to file quarterly discharge monitoring reports. The vast majority of those MMPs have been imposed for quarters in which no reportable discharges occurred. Our clients, and many other water suppliers, are thus very interested in the draft revisions to the State Board's Enforcement Policy now under consideration and for which the State Board will conduct a workshop on June 4, 2009.

We have reviewed the proposed revisions to the Enforcement Policy, with particular emphasis on Section VII – Mandatory Minimum Penalties for NPDES Violations, starting at page 27 of the May 6 revision of the Enforcement Policy. We thank the State Board and its staff for their consideration in adding provisions to the Policy to address some of the issues that have been brought to staff's and the Regional Water Quality Control Boards' attention regarding problems encountered in connection with the imposition of MMPs, particularly regarding the imposition of MMPs for failing to file discharge reports when no reportable discharges occurred (see subdivision 2 on page 31 of the May 6 revision of the Policy). We very much support the addition of that subdivision to the Enforcement Policy.

However, we believe additional issues remain to be addressed. We have therefore prepared the attached proposed redlined revisions to the State Board's Policy and offer

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the following comments to explain those proposed substantive changes, as well as to address other issues that should be covered in the Enforcement Policy.

1. Providing Notice of any Alleged Violations Giving Rise to MMPs. We propose to add language to Section VII(A) that would have Regional Boards, promptly upon learning of the failure to file a discharge report, provide notice to the discharger of that failure. We understand that computerized databases are now used to collect and analyze such discharge reports as they are submitted and Regional Boards can therefore easily become aware of any permittee who has not complied with its reporting obligation. Our experience in the recent instances of MMP violations has been that when public water supplier dischargers are made aware of the failure to file discharge reports, they promptly remedy that failure by forwarding to the Regional Board responsive information. In that regard, the Enforcement Policy states that the Water Code's intent is "to assist in bringing the State's permitted facilities into compliance with WDRs." Such a notice provision furthers that intent by promoting prompt remediation of reporting violations, instead of allowing such violations to continue indefinitely.

For similar reasons, we believe the 18 month time frame stated in the draft Policy is too long, and serves to allow violations to unnecessarily continue. The time frame for issuance of MMPs should be shortened to six months from the time a violation qualifies as a mandatory minimum penalty, as such "serious violations" should be remedied much sooner than 18 months after the MMPs arise.

2. Expedited MMP Issuance Should Apply to any Community that is Faced with Financial Hardship. While we recognize that subdivision (k) of Water Code section 13385 specifically identifies small, rural communities with financial hardship for special treatment under that statute, for purposes of application of the Enforcement Policy's expedited MMP issuance, we believe that same expedited treatment should apply across the board to any community that faces financial hardship under the applicable criteria.

3. The Total Mandatory Penalty to Trigger Expedited MMP Issuance should be Reduced. A trigger of \$30,000 is too high to trigger MMP issuance. Again, if the Policy's goal is to promptly remedy "serious violations" that give rise to MMPs, earlier notice and enforcement will result in more expeditious remediation of those violations.

4. Discharges That Do Not Exceed Effluent Limitations. The final Assembly Report of AB 1541, which enacted Water Code section 13385.1, states that the intent of that statute is to punish dischargers who hide Clean Water Act violations. That legislative intent is not furthered by punishing permittees whose discharges have not exceeded an applicable effluent limitation, thereby resulting in no Clean Water Act violation and no environmental harm. The Regional Boards should have discretion to conclude that a failure to submit the monitoring report in a timely manner does not

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constitute a "serious violation" under section 13385.1, and therefore, MMPs need not be imposed. Moreover, it has been our experience that these failures to report result from inadvertence, rather than from any intent to violate a permit provision, let alone the Clean Water Act. These violations are more accurately categorized as minor or ministerial, rather than "serious," a categorization that is evidenced by the Policy's categorization of such violations as Class III violations (see page 6 of the May 6, 2009 revision to the Enforcement Policy). We therefore propose to add a new Subdivision 2 and related language to address this issue.

In this regard, State Board staff and Regional Board staff has informed us of their interpretation that such a reduction of a violation would violate Water Code section 13385.1. If the State Board cannot revise its Policy to more equitably address this issue in relation to such non-existent or minor threats to water quality, then we encourage the State Board to seek statutory revisions that provide the Water Boards with the flexibility to determine, on a case-by-case basis, whether a failure to timely file a monitoring report during a period involving discharges that do not exceed effluent limitations constitutes a minor violation as opposed to a serious violation. That flexibility will avoid required imposition of MMPs that may eventually total hundreds of thousands of dollars in a situation where no environmental harm results and no financial benefit is derived by the discharger.

5. Calculation of MMPs. The May 6 proposed revisions to the Enforcement Policy do not propose any revisions regarding how MMPs are calculated. Under Water Code section 13385.1, as it is currently being applied, each failure to file a quarterly monitoring report is an individual "serious violation" to which a \$3,000 MMP applies. Additional violations and the accompanying \$3,000 MMP then accrue for each subsequent 30-day period for which the report is not filed. Under the current interpretation that is being applied, these monthly penalties overlap with other quarters for which reports have not been filed, resulting in substantial penalties, particularly where a permittee is completely unaware of any violation and the Regional Board is under no compulsion (for at least 18 months under the revised draft Policy) to inform the permittee of the violations.

The current interpretation also conflicts with the provision of Water Code section 13385(h)(1), which imposes a mandatory minimum penalty of \$3,000 for "each serious violation." Under principles of statutory interpretation, where such a conflict exists, the conflicting should, where possible, be harmonized. Here, the two statutes can be harmonized by reading the two statutory provisions together to apply a single penalty of \$3,000 for each quarterly report that is not timely filed, rather than the continuing accrual of \$3,000 penalties for each subsequent month. That interpretation avoids the absurd result of the far more severe penalizing of late reporting as compared to other "serious

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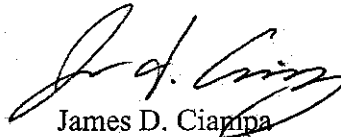
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violations" (such as effluent limitation exceedances) that result in environmental harm but are subject to only a single \$3,000 MMP.

In addition, such substantial penalties far exceed any harm to the environment that has occurred (which is non-existent in the cases with which we have been involved) and apply where the permittee obtains no financial benefit from its failure to report. In light of these factors and given the de minimis nature of the violation, we believe that adequate notification, as discussed in Comment No. 1, above, and a single penalty, if warranted, should eliminate future failures to file monitoring reports.

Thank you for your consideration of these comments and our proposed revisions to the State Board's Enforcement Policy. Our water supplier clients want the State Board to understand that they concur in the State Board's and Regional Boards' goals in protecting water quality. However, imposition of MMPs in the hundreds of thousands of dollars, as has recently occurred, would result in significant financial harm to water suppliers, and ultimately their customers, in instances where absolutely no harm to the environment occurred. no Clean Water Act violations occurred and no such violations were hidden.

Sincerely,



James D. Cianna

JDC/cc
Attachment

cc: Mr. Mark Grajeda, Pico Water District (via e-mail only)
Mr. Dennis Erdman, Crescenta Valley Water District (via e-mail only)
Mr. Gustavo Villa, Maywood Mutual Water Company No. 2 (via e-mail only)

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VII. MANDATORY MINIMUM PENALTIES FOR NPDES VIOLATIONS

Mandatory penalty provisions are required by California Water Code section 13385, subdivisions (h) and (i) for specified violations of NPDES permits. For violations that are subject to mandatory minimum penalties, the Water Boards must either assess an ACL for the mandatory minimum penalty or for a greater amount.

A. Notice and Timeframe for Issuance of Mandatory Minimum Penalties (MMPs)

The intent of these provisions of the California Water Code is to assist in bringing the State's permitted facilities into compliance with WDRs. In order to assist with such compliance, promptly upon a Regional Water Board learning of a violation that may be subject to MMPs pursuant to California Water Code section 13385.1, the Regional Water Board should provide written notice to the discharger, similar to a Notice to Comply issued pursuant to Water Code sections 13399 et seq., regarding the alleged violation.

The Water Boards should issue MMPs within six months of the time that the violations qualify as mandatory minimum penalty violations. The Water Boards shall expedite MMP issuance; (a) if the discharger qualifies as a small community with financial hardship, (b) if the violation occurs under California Water Code section 13385.1 and the discharger is a retail water supplier that provides water service to any community with financial hardship, as determined under section B, below, or (c) when the total mandatory penalty amount reaches \$9,000. Where the NPDES Permit is being revoked or rescinded because the discharger will no longer be discharging under that permit, the Water Boards shall ensure that all outstanding MMPs for that discharger are issued at least 30 days prior to termination of their permit to discharge.

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[no changes proposed to Sections B & C]

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D. Defining a "Discharge Monitoring Report" in Special Circumstances under 13385.1

Section 13385.1(a)(1) states "for purposes of subdivision (h) of section 13385, a 'serious violation' also means a failure to file a discharge monitoring report required pursuant to section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations."

The legislative history of section 13385.1 indicates that the Legislature enacted the statute primarily to ensure better reporting by dischargers who might otherwise avoid penalties for violations of their Clean Water Act permits by intentionally failing to submit monitoring reports that could disclose permit violations.

Because penalties under section 13385.1 are assessed for each complete period of thirty days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time period. Dischargers who fail to conduct their required monitoring cannot go back and recreate and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30 day period following the deadline for submission until an Administrative Civil Liability Complaint for MMPs is issued.

In other instances, a discharger may have conducted the required monitoring, but failed to submit that data to the Regional Water Board. Such instances can occur due to a change in management, change in a permitted agency's responsible employee's administrative duties or responsibilities, a failure of the permitted agency's responsible person to pass on the conditions of the permit to the subsequent employee responsible to perform such duties, or a failure by the discharger to fully understand the conditions of the applicable NPDES permit.

This policy is designed to assist dischargers by stopping the accrual of penalties for late or missing reports under the special circumstances described below. Nevertheless, under these circumstances, the discharger has the burden of submitting the required documentation pursuant to this policy.

The following subsections provide additional guidance on the definition of a "discharge monitoring report," for the purposes of subdivision (a) of section 13385.1 only, in situations where: (1) there was a discharge to surface waters, but the Discharger failed to conduct any monitoring during that monitoring period, (2) there was a discharge to surface waters, the Discharger conducted required monitoring, the data obtained demonstrates no exceedance of any applicable effluent limitation, but the Discharger failed to submit that data to the Regional Water Board, or (3) there was no discharge to surface waters during the relevant monitoring period.

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1. Defining a "Discharge Monitoring Report" Where There is a Discharge to Surface Waters and the Discharger Fails to Conduct Any Monitoring During the Monitoring Period

For purposes of section 13385.1, in circumstances where a discharge to surface waters did occur, but where the discharger failed to conduct any monitoring during the relevant monitoring period, a "discharge monitoring report" shall include a written statement to the Regional Water Board, signed under penalty of perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), stating:

- a. That no monitoring was conducted during the relevant monitoring period;
- b. The reason(s) the required monitoring was not conducted; and
- c. If the written statement is submitted after the deadline for submitting the discharge monitoring report, the reason(s) the required discharge monitoring report was not submitted to the Regional Water Board by the requisite deadline.

Upon the request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to state under penalty of perjury that it did not conduct monitoring for the required period ensures that the discharger is not conducting monitoring and withholding data indicating there are effluent limitation violations. This approach may not be used if the Discharger conducted any monitoring during the monitoring period that it is required to report to the Regional Water Board because the results of that monitoring, even if incomplete, must be submitted to the Regional Water Board. This approach is consistent with the original legislative purpose of section 13385.1.

The written statement shall be treated as a "discharge monitoring report" for purposes of section 13385.1(a). MMPs for late or missing discharge monitoring reports assessed for each 30 day period will cease accruing upon the date the written statement is received by the Regional Water Board. While the submission of the written statement provides a cut-off date for MMPs assessed under [section] 13385.1, the Regional Water Board, at its discretion, may impose additional discretionary administrative civil liabilities pursuant to section 13385(a)(3).

2. Defining a "Discharge Monitoring Report" Where There is a Discharge to Surface Waters, the Discharger Conducts Monitoring During the Monitoring Period, No Effluent Limitation is Exceeded, but the Discharger Fails to Submit the Monitoring Report to the Regional Water Board

For purposes of section 13385.1, in circumstances where a discharge to surface waters did occur, monitoring was conducted during the relevant monitoring period but no effluent limitation was exceeded, and the discharger failed to timely submit a "discharge monitoring report," the discharger's failure to submit the monitoring report shall not be considered a "serious violation" under section 13385.1 that gives rise to MMPs if the discharger submits a written statement to the Regional Water Board, signed under penalty of perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), including the following:

- a. The facts and circumstances regarding the subject discharge(s), including the date(s) and time(s) of the discharge(s) and the quantity of water discharged during each such discharge;
- b. True and correct copies of all laboratory analyses of the water discharged during such discharge event(s) demonstrating that no applicable effluent limitation was exceeded; and
- c. The reason(s) the discharge monitoring report was not submitted to the Regional Water Board by the requisite deadline.

Upon the request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to provide evidence in the form of laboratory analyses demonstrating that no effluent limitation exceedance occurred and to state under penalty of perjury the

circumstances under which the discharger failed to submit the required discharge monitoring report for the required period ensures that the discharger is not withholding data indicating there are effluent limitation violations. This approach is consistent with the original legislative purpose of section 13385.1 to punish dischargers who intended to hide Clean Water Act violations.

The written statement and supporting laboratory analyses do not constitute a "discharge monitoring report" for purposes of section 13385.1(a) so long as no effluent limitation exceedance occurred. The late submittal of such a statement would be subject to discretionary civil liabilities, but would not be subject to MMPs.

3. Defining a "Discharge Monitoring Report" Where There is No Discharge to Surface Waters

Some waste discharge requirements and/or associated monitoring and reporting programs for episodic or periodic discharges require the submission of either a discharge monitoring report if there were discharges during the relevant monitoring period, or a report documenting that no discharge occurred if there were no discharges.

A report that is required to be submitted to document that no discharge to surface waters occurred during the relevant monitoring period is not a "discharge monitoring report" for purposes of section 13385.1(a). Under these circumstances, that report would not ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations, and therefore, the late submittal of such a report would be subject to discretionary civil liabilities, but would not be subject to MMPs.

As a matter of practice, however, if such a report has not been received and the Regional Water Board is aware of facts, circumstances or other evidence demonstrating that discharges from the discharger occurred during the relevant monitoring period, the Regional Water Board may presume that there were discharges during the relevant monitoring period and should consider imposing MMPs for the failure to timely submit a discharge monitoring report. The Regional Water Board shall not take final action to impose the MMP, and may reverse any prior action taken to impose the MMP, if the discharger submits a written statement to the Regional Water Board, signed under penalty of perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), stating:

- a. That there were no discharges to surface waters during the relevant monitoring period; and
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Upon the request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a

discharger to state under penalty of perjury that it did not discharge during the relevant monitoring period ensures that a discharger is not discharging and conducting monitoring and then withholding data indicating there are effluent limitation violations.

If such a statement is submitted, the ongoing accrual of discretionary administrative civil liabilities, which the Regional Water Boards may assess under section 13385(a)(3), will cease upon the date the written statement is received by the Regional Water Board.

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Because penalties under section 13385.1 are assessed for each complete period of thirty days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time period. Dischargers who fail to conduct their required monitoring cannot go back and recreate and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30 day period following the deadline for submission until an Administrative Civil Liability Complaint for MMPs is issued.

In other instances, a discharger may have conducted the required monitoring, but failed to submit that data to the Regional Water Board. Such instances can occur due to a change in management, change in a permitted agency's responsible employee's administrative duties or responsibilities, a failure of the permitted agency's responsible person to pass on the conditions of the permit to the subsequent employee responsible to perform such duties, or a failure by the discharger to fully understand the conditions of the applicable NPDES permit.

This policy is designed to assist dischargers by stopping the accrual of penalties for late or missing reports under the special circumstances described below. Nevertheless, under these circumstances, the discharger has the burden of submitting the required documentation pursuant to this policy.

The following subsections provide additional guidance on the definition of a "discharge monitoring report," for the purposes of subdivision (a) of section 13385.1 only, in situations where: (1) there was a discharge to surface waters, but the Discharger failed to conduct any monitoring during that monitoring period, (2) there was a discharge to surface waters, the Discharger conducted required monitoring, the data obtained demonstrates no exceedance of any applicable effluent limitation, but the Discharger failed to submit that data to the Regional Water Board, or (3) there was no discharge to surface waters during the relevant monitoring period.

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Upon the request of the Regional Water Board, the discharger may be required to support the written statement with additional explanation or evidence. Requiring a discharger to state under penalty of perjury that it did not conduct monitoring for the required period ensures that the discharger is not conducting monitoring and withholding data indicating there are effluent limitation violations. This approach may not be used if the Discharger conducted any monitoring during the monitoring period that it is required to report to the Regional Water Board because the results of that monitoring, even if incomplete, must be submitted to the Regional Water Board. This approach is consistent with the original legislative purpose of section 13385.1.

The written statement shall be treated as a "discharge monitoring report" for purposes of section 13385.1(a). MMPs for late or missing discharge monitoring reports assessed for each 30 day period will cease accruing upon the date the written statement is received by the Regional Water Board. While the submission of the written statement provides a cut-off date for MMPs assessed under [section] 13385.1, the Regional Water Board, at its discretion, may impose additional discretionary administrative civil liabilities pursuant to section 13385(a)(3).

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